



Non-Confidential

## DMEA APPEAL OF THE TRI-STATE AUGUST 23, 2018 POLICY 316 DECISION

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### OVERVIEW

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DMEA appeals the Tri-State Board's August 23, 2018 written decision ("Decision") under Tri-State Board Policy 316.<sup>1</sup>

Kit Carson exited Tri-State in 2016 for \$37 million. A Tri-State press release at the time described that exit number as "fair and equitable." Seven months later, Tri-State gave DMEA [REDACTED] million buyout price—nearly [REDACTED] more. Tri-State claimed it applied the same mark-to-market exit approach for Kit Carson and DMEA. Yet *none* of the mark-to-market calculation factors explained the discrepancy: DMEA was not [REDACTED] than Kit Carson. The price of power on the market hadn't changed by [REDACTED] Tri-State's power prices hadn't changed by [REDACTED]

While attempting to negotiate an equitable withdrawal from Tri-State, DMEA sought information to understand how the same Tri-State mark-to-market methodology yielded such dramatic differences. This included Policy 406 information requests for both DMEA and Kit Carson-related information. (Kit Carson had consented to disclosure.) Dissatisfied with Tri-State's response to the requests and Tri-State's position in the exit negotiations, DMEA filed this Policy 316 complaint.

The core issue in DMEA's Policy 316 complaint is whether the DMEA buyout number is fair and equitable under Tri-State's bylaws. DMEA believes that Tri-State's refusal to provide a fair number—or to justify its dramatically higher number—suggests arbitrariness and bad faith, violates DMEA's legal rights and public policy, and directly harms DMEA and the retail members it serves.

Tri-State staff drafted its own position statement on DMEA's information request and asked the Board to direct Tri-State staff to negotiate "equitable terms" that "allow DMEA to withdraw from membership while continuing to honor its wholesale electric service contract with Tri-State." (Tri-State July 25 Position Statement at 10.) Staff alternatively asked the Board to authorize staff to, at its discretion, negotiate an equitable contract buyout while "resolving all reasonable doubts in a manner designed to protect the financial interests of remaining Tri-State members." (*Id.*)

The Tri-State Board's Decision largely mirrors Tri-State staff's July 25 reasoning, conclusions, recommendations, and language. The Decision reflects virtually no meaningful consideration of the arguments DMEA made during its July 10 Policy 316 hearing presentation, DMEA's own July 25 position statement (included with this appeal as Attachment A), or the comments provided by other member cooperatives during the Policy 316 complaint process.

Tri-State's Decision fails to address DMEA's arguments, misstates factual issues, and misapplies the law. DMEA asks the Tri-State Board to change its position and to adopt the proposed findings and directives from DMEA's July 25 position statement (Attachment A at Section III).

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<sup>1</sup> This appeal only summarizes DMEA's objections to the Decision, and DMEA may advance other arguments in the future. Kyle Martinez, who serves as a director for DMEA and Tri-State, had no role relating to this appeal.

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## OBJECTIONS AND APPEAL

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### I. DMEA IS ENTITLED TO ALL INFORMATION ABOUT ITS OWN CALCULATIONS.

#### A. Tri-State admits to withholding important DMEA-related modeling and information.

The Decision endorses the Tri-State staff's confused approach to DMEA's request for its buyout information and modeling. Tri-State claims to have "provided DMEA with *all information* concerning Tri-State's buyout calculations." (Decision at 5 (emphasis added).) Tri-State lists the key inputs it gave and claims the information was so comprehensive that DMEA conceded it could "more or less" "replicate" the Tri-State buyout number. (*Id.* at 7.)

If Tri-State had provided DMEA with "all information" about Tri-State's buyout calculations, however, it would have denied DMEA's information request by explaining that DMEA had everything. But Tri-State didn't argue that. This is because, as Tri-State quickly conceded in a single line of the Decision, Tri-State continues to withhold a spreadsheet "and other work product." (*Id.* at 7.)

#### B. The withheld information would help DMEA understand Tri-State's exit calculations.

Tri-State emphasizes more than once that DMEA can "replicate" the final Tri-State buyout number based on the "inputs" Tri-State has provided. (Decision at 5, 7.) But replicating a buyout formula using inputs is different from understanding how the inputs themselves were derived.

As DMEA explained in its July 25 written statement (Attachment A at Question 7), DMEA has not seen the withdrawal calculation spreadsheet with its assumptions, data, inputs, and formulas that DMEA can analyze and understand. Without access to this spreadsheet and work product, DMEA can only speculate how Tri-State staff calculated the variables in DMEA's disproportionately large exit number. Essentially Tri-State says " $x + y - z = \text{DMEA's exit price,}$ " but won't show how it calculated  $x$ ,  $y$ , or  $z$ . DMEA asks to see how the variables were calculated.

It's wrong for Tri-State staff to conflate certain inputs (which it has given DMEA) with the information establishing the inputs (which it has not given). Yet that's exactly what Tri-State has done. As DMEA's CEO stated at the July 10 Policy 316 hearing, DMEA generally understands how Tri-State reached its overall calculation, "but not the details of each component that you plug into that calculation."

#### C. It is reasonable for DMEA to request Tri-State's withheld information.

As explained above, Tri-State justifies saying that DMEA's request is "unreasonable and should be denied" (Decision at 7) by wrongly conflating two kinds of information. Tri-State claims to be applying an established mark-to-market formula to calculate DMEA's buyout. It is reasonable for DMEA as a Tri-State member-owner to want transparency with respect to how Tri-State reached the inputs, particularly given the [REDACTED] million buyout number. DMEA understands Kit Carson was provided with its spreadsheet and work materials and respectfully requests that the Tri-State Board direct management to share with DMEA all of its own information.

## **II. THE REQUEST FOR KIT CARSON'S INFORMATION SHOULD ALSO BE GRANTED.**

Tri-State gives three reasons for rejecting DMEA's request for Kit Carson-related information. It first says the information is confidential to Kit Carson. It next says disclosure would harm other Tri-State members because their interests are adverse to DMEA's. Finally, Tri-State claims that disclosing the information will be a uselessly "burdensome exercise" because the Kit Carson exit "has little or no relevance" to DMEA's proposed withdrawal. (Decision at 7.) Each of these justifications lacks merit. The last two reasons also contradict each other.

### **A. Tri-State cannot justify withholding Kit Carson-related information when written permission has been given to share it with DMEA.**

Kit Carson consented to disclosure of its exit-related information and calculations to DMEA in an April 13, 2018 letter to Tri-State. The Tri-State Decision notes that the letter authorizes disclosure (*id.* at 5) but omits the letter from its analysis. Tri-State "does not disclose one Member System's confidential information to another Member System," it says, "regardless of whether such information is subject to a confidentiality agreement." (Decision at 6.) This is a red herring. It ignores that Kit Carson, a (former) member system, *explicitly consented* to disclosure to DMEA. It also ignores Tri-State Policy 406(C)(1)(f), which lets Tri-state "release such information" when it gets "written authorization of the Member System that supplied the information." That is precisely what happened here, as detailed in DMEA's July 25 position sheet (Attachment A at Question 13).

The Decision also justifies withholding information on the ground that Tri-State staff has "refused to waive any of Tri-State's rights under the [Kit Carson] confidentiality agreement." (Decision at 6.) This doesn't logically follow: Tri-State says the confidentiality agreement with Kit Carson "obligated each side to preserve the confidentiality of all information *received from the other*." (*Id.* at 5 (emphasis added).) Kit Carson has released Tri-State from its obligation to preserve Kit Carson's information. Tri-State cannot force Kit Carson to keep Kit Carson's own information confidential.

### **B. Refusing to release the Kit Carson-related information because of supposedly "adverse interests" between DMEA and other Tri-State members reflects a troubling approach by Tri-State to its member relationships.**

Tri-State says the requested Kit Carson information is also confidential to Tri-State itself and should not be shared because, when it comes to exit, "DMEA's financial interests are adverse to the interests of Tri-State and the remaining members." (Decision at 7.) "[E]very dollar less DMEA pays to 'buy out' of its contract is a dollar that otherwise would be received by Tri-State for the benefit of all remaining members." (*Id.*) The Decision misses the mark for several reasons.

*As an initial matter*, there are situations wherein one member's financial interests are "adverse" to those of other members and yet Tri-State addresses the matter transparently and forthrightly. Policy 115 projects, energy efficiency projects, and rate making, for example, place "adverse" cooperatives against each other. Why treat member exit differently?

*Second*, and more fundamentally, knowledge of a member's equitable exit information would not disadvantage other Tri-State members. It would benefit them: When Kit Carson withdrew, Tri-State issued a press release declaring the exit "fair and equitable, and protect[ing] the interest of all the

association's members." If the Kit Carson exit was "fair and equitable" to all Tri-State members, how are members disadvantaged if Tri-State treats another exiting member on similar terms? The votes of the non-exiting members will greatly outnumber that of the exiting member. There is no reason for Tri-State to fear negotiating with an informed member.

*Third*, Tri-State frames an exiting member as an outside "adversary." This conflicts with cooperative membership principles and fails to account for the fact that Tri-State's own Bylaws provide that member exits are to occur on fair and "equitable" terms. The Bylaws direct the parties to reach *equitable* terms, not terms that maximize the advantage of either the exiting member or the remaining members.

*Fourth*, transparency about an exit ultimately *protects the rights of every other cooperative*. Transparency within the Tri-State membership reaffirms to each member that, should at some point in the future it also consider exiting (consistent with Tri-State's "core principle" of voluntary membership), it would be treated consistently and fairly with those that had withdrawn earlier.

*Fifth*, transparency is necessary for members to know how the cooperative handled each negotiation from a financial standpoint. Did management do an effective job negotiating the exit of a given cooperative? Was it indeed "fair and equitable" such that the exit produced terms that preserve the financial health of Tri-State? Without this information—which again Tri-State Staff insists on withholding from any scrutiny—neither Tri-State's Board nor its member-owners can answer those critical questions. (See Attachment A at Question 15.)

Tri-State's framing the issue in purely adversarial terms reveals a fundamental misunderstanding about the nature of a cooperative. Members are not "adverse" parties to be guarded against; they are *the reason* Tri-State was formed. Treating the exiting member fairly and equitably benefits all of the members. Tri-State should honor the commitment it made to every member wanting to exit—not disparage it, and not undermine it—just as it would honor any other contractual obligation.

**C. Tri-State contradicts its own assertion that the Kit Carson exit "has little or no relevance" to DMEA's exit.**

Tri-State argues that exiting member cooperatives are incomparable apples and oranges. Kit Carson's exit, it claims, "has little or no relevance to DMEA's proposed withdrawal from Tri-State" because the "Mark to Market Method creates a buyout number based upon a unique set of circumstances that exists at a point in time." (Decision at 7.) The circumstances of Kit Carson's exit "have long since passed" and are thus "quite different from those presented by DMEA's proposed withdrawal." (*Id.* at 7.)

This argument lacks merit primarily because the nature of Tri-State's mark-to-market methodology *makes* the exit of one member relevant to the others. There are three major factors in Tri-State's mark-to-market exit methodology: the size of an exiting member's load, future market power prices, and Tri-State's rates. Each one of these factors can be adjusted to reflect different circumstances and then be compared. Kit Carson provides a benchmark reference for fair and equitable exit terms. The exact same methodology applies to DMEA. *How* Tri-State projected market conditions, loads, rates, etc., and *how* it incorporated these factors into its Kit Carson exit number, are relevant factors that DMEA should know.

Of course, Kit Carson's information will not be exactly on point in every respect. Time has passed, load forecasts are different, and so on. But it's still a meaningful reference: As DMEA previously noted, a 2016 road map is still relevant for a driver in 2018 even if the map is two years old.

In any event, if the information truly has "little or no relevance," why not share it and put the burden of proving its relevance on DMEA? Tri-State's seeming lack of confidence in its argument for irrelevance is telling.

But most telling is Tri-State's Decision itself, which demonstrates the continued relevance of the Kit Carson exit and why this information is critical. Tri-State complains that DMEA's request for Kit Carson-related exit information would undermine Tri-State's negotiating position, arguing that "[w]hile negotiating against the interests of Tri-State, DMEA asks the Board to require Tri-State staff to surrender its confidential negotiating information." (Decision at 7.) DMEA doubts that Tri-State would make that assertion if Kit Carson's exit truly had "little or no relevance."

Tri-State's eagerness to declare the Kit Carson exit information irrelevant yet at the same time assert it could be damaging to Tri-State's negotiating position merits scrutiny. If Kit Carson's \$37 million exit number was equitable and covered other members' risk, as management claims (while withholding the relevant information it says supports that), then DMEA's [REDACTED] number is inequitable. If DMEA's [REDACTED] exit number is necessary to cover the risk to Tri-State's remaining members, Kit Carson's exit unfairly left the remaining members with millions of dollars in risk. Either way, management's actions—including what they represented to the Board during Kit Carson's exit, and what they're representing now—are deeply troubling.

### **III. TRI-STATE'S POSITION THAT IT MAY, BUT NEED NOT, ALLOW EXIT ON FAIR AND EQUITABLE TERMS IS INCONSISTENT WITH ITS PREVIOUS POSITIONS, SUGGESTS ARBITRARINESS AND BAD FAITH, VIOLATES PUBLIC POLICY AND HARMS BOTH DMEA AND ITS RETAIL DISTRIBUTION MEMBERS.**

In its July 25 written statement, Tri-State staff asserted the Tri-State bylaws say the Board "may, but need not" prescribe equitable terms and conditions for exit. (Tri-State July 25 written statement at 6.) The word "may," TSGT says, grants "discretion and imposes no obligation." (*Id.*) DMEA's withdrawal is thus "entirely within the discretion of the Board." (*Id.* at 8.) As with virtually every other question, Tri-State's Board appears to have endorsed management's view in the Decision without any analysis. It observes: "As the Board understands Section 3(a) of Tri-State's bylaws, it may but need not prescribe equitable terms and conditions for DMEA to withdraw from Tri-State." (Decision at 7.)

#### **A. Tri-State's denial that its members have a right to a fair and equitable exit is inconsistent with its previous positions.**

Tri-State's position in its Decision that it could (but need not) let a member exit on equitable terms is inconsistent with the position it took in the NPSIG/*Chimney Rock* litigation referenced on page 4 of the Decision. That litigation presumed that the NPSIG members had the right to exit on equitable terms as provided in the Tri-State Bylaws, Article 1, Section 3.

Tri-State's position is also inconsistent with Tri-State staff's 2016 attempt to amend that section of the Bylaws. The proposed amendment would have removed the requirement that members be allowed to withdraw on "equitable terms and conditions" and instead let Tri-State set the terms of any



withdrawal “in its sole discretion.” (*See* Exhibit 2 to DMEA’s May 30, 2018 Policy 316 Complaint.) The attempted amendment failed, yet Tri-State now insists on reading the Bylaws as though “sole discretion” were the relevant standard.

**B. Tri-State’s denial that its members have a right to a fair and equitable exit suggests arbitrariness and bad faith.**

Tri-State identifies “voluntary and open membership” as the first among a purported “core set of principles.” (Exhibit 1 to DMEA’s May 30, 2018 Policy 316 Complaint.) Tri-State’s interpretation of the Bylaws in its Decision, however, raises questions about that commitment. Indeed, Tri-State’s Decision seems to suggest that whether the Board will offer an exiting member a fair and equitable withdrawal depends on what side of the bed the decisionmakers at Tri-State woke up on. This makes voluntary membership a strikingly weak “core principle,” and it calls into question Tri-State’s good faith commitment to the Bylaws and the other supposed “core principles.”

Tri-State claims Kit Carson obtained a “fair and equitable exit.” Yet Tri-State takes the position that a future cooperative need not get a fair and equitable exit. Tri-State could even claim to be providing a member with fair and equitable terms while in fact subjecting them to inequitable ones. Without transparency, how can the cooperatives know? What criteria does Tri-State employ to decide which member-owners get fair and equitable terms, and which member-owners get unfair and inequitable ones? Tri-State’s Decision embraces a type of discriminatory and unfair arbitrariness that would invite critical scrutiny from a jury or regulator.

It’s also unclear how Tri-State’s “we could be fair, but maybe not” approach to exiting members fits with the Board’s commitment to the mark-to-market exit methodology (*see* Decision at 4). One might suppose that Tri-State’s adopted methodology is meant to be a fair and objective method of calculating a buyout amount. Tri-State’s Decision calls this into question. Does Tri-State sometimes use a mark-to-market approach that’s fair and equitable, but sometimes not? Was Tri-State’s [REDACTED] exit number for DMEA the result of a fair and equitable application of mark-to-market, or an arbitrary application of mark-to-market that Tri-State staff set in its “sole discretion”? And how can DMEA verify this when Tri-State withholds the relevant information?

Of course, one way to verify fairness is to share information about underlying modeling for both DMEA and Kit Carson. But Tri-State refuses to do that.

**C. Tri-State’s “we could be fair, but maybe not” approach to member exit violates public policy and harms both DMEA and its retail distribution members.**

In its July 25 position statement, DMEA explained that it has spent time and effort assessing how it can best serve its retail member-owners given Tri-State’s high wholesale rates. Based on the exit terms Tri-State gave Kit Carson (which had the same 2040 wholesale power contract as DMEA), DMEA believes it can exit Tri-State on fair and equitable terms that will benefit DMEA’s retail members in the long term. (*See* Attachment A at Question 5.)

Tri-State’s questionable commitment to fairness and equity—and its explicit embrace of a “we could be fair, but maybe not” approach to membership exit—suggest that Tri-State treats these Bylaw provisions like illusory contract wherein it completely dictates the terms. DMEA’s ability to exit Tri-State and provide its retail members with lower-cost power alternatives can be jeopardized by Tri-

State's demand for an exorbitant and unfeasible buyout price. Set a buyout price for an unfairly high amount—say, [REDACTED]—and most members can never exit.

Ultimately those hurt by Tri-State's approach are not the distribution cooperatives, but the retail customers—*i.e.*, members of the public—who are deprived of a less costly and more efficient alternative power option because their distribution cooperative cannot withdraw from Tri-State on fair and equitable terms. The position Tri-State takes in its Decision is thus detrimental to the public good.

#### **IV. TRI-STATE CANNOT DIRECT STAFF TO NEGOTIATE A DMEA MEMBERSHIP WITHDRAWAL WHILE KEEPING THE DMEA/TRI-STATE WHOLESALE ELECTRIC SERVICE CONTRACT IN PLACE.**

Tri-State contends that DMEA can withdraw from membership *and* continue to perform under its 2040 wholesale electric contract. Tri-State directs staff to negotiate “equitable terms” for DMEA membership withdrawal while keeping DMEA's current electric wholesale power contract in place until 2040. (Decision at 8.) This would “avoid any reallocation of the financial risk to which [DMEA and the remaining members] agreed when the [2040] contract was signed.” (*Id.*) DMEA objects to this for several reasons.

First, Tri-State's approach violates the Bylaws because membership is intertwined with a member's wholesale electric contract. Withdrawal under Bylaw Section 3(a) is temporally restricted, meaning that it is prohibited (the language of the Bylaw is mandatory) until after a member has fulfilled its contractual obligations to Tri-State. Read as a whole, the Bylaw requires Tri-State to allow a member to exit on terms that provide for a fair and equitable termination of any wholesale electric supply contract, otherwise the withdrawal rights under the Bylaw are illusory.

Moreover, Tri-State's approach to membership withdrawal while remaining in the wholesale contract would have DMEA giving up the benefits of membership for nothing in exchange. That's neither fair nor “equitable.” Nor is it what Tri-State did with Kit Carson. Withdrawal on equitable terms inherently includes an equitable or fair termination of the parties' wholesale electric contract.

DMEA's argument on this point is strengthened by the fact that Tri-State has applied the Bylaw in this fashion to prior withdrawals, including to the Chimney Rock coops and Kit Carson. Indeed, Tri-State has even approached DMEA's withdrawal in this fashion, but simply has refused to provide terms that are equitable.

Finally, the arguments Tri-State advances in its Decision undermine the assertion that meeting contractual obligations to Tri-State requires purchasing power from it through 2040. Toward the beginning of its Decision, Tri-State identifies specific obligations for which DMEA is responsible. (Decision at 2.) Those obligations relate to debt used to build assets that serve DMEA. (*Id.*) Tri-State thus highlights the dramatic gap between money raised in the mark-to-market methodology and money necessary to satisfy DMEA's obligations under the wholesale electric supply contract.

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**CONCLUSION**

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For the reasons stated above, DMEA requests that Tri-State change its position and adopt the proposed findings and directives from DMEA's July 25 position statement.

Dated: September 21, 2018



Jasen Bronec, Chief Executive Officer  
Delta-Montrose Electric Association

/ Attachment



**ATTACHMENT A**

**DMEA's JULY 25, 2018 POSITION STATEMENT  
AND PROPOSED FINDINGS AND DIRECTIVES**



*Non-Confidential*

**VIA U.S. MAIL AND EMAIL**

July 25, 2018

Board of Directors  
Tri-State Generation and Transmission Association, Inc.  
1100 W 116th Ave  
Westminster, CO 80234

**Re: Delta-Montrose Electric Association (DMEA) Policy 316 Statement of Position**

Dear Tri-State Board of Directors:

Here is a copy of DMEA's Statement of Position for the Policy 316 complaint that you will be considering during Tri-State's August board meeting.<sup>1</sup> We know that Tri-State directors have many documents to read before every meeting, so we tried keeping it short and direct.

Tri-State management wants you to reject DMEA's Policy 316 complaint because of the difficult questions it raises, and because of the difficult truths to which it might lead. But doing that would mean letting management continue withholding information about DMEA and about Kit Carson from you as Tri-State Board members and from the member-owners of Tri-State. Accepting management's arguments on their face means never having to meaningfully consider the core issue in DMEA's Policy 316 complaint: Is management's DMEA buyout number fair and equitable under Tri-State's bylaws?

Kit Carson exited for \$37 million. DMEA's buyout number is [REDACTED]. That's [REDACTED] times larger. Yet none of the mark-to-market factors that Tri-State uses in buyout calculations explains this difference: DMEA is not [REDACTED] larger than Kit Carson. The price of power on the market hasn't changed by [REDACTED]. Tri-State's power prices haven't changed by [REDACTED]. How can the same methodology result in such a dramatic discrepancy? This inexplicable difference is why DMEA has requested the Kit Carson transaction data and all of Tri-State's underlying modeling for DMEA.

What is Tri-State management's answer? Reject DMEA's Policy 316 complaint. Don't worry that many of DMEA's points haven't been addressed. And don't consider that maybe DMEA is right.

- If you think it's right for management to withhold information from the Tri-State Board and from Tri-State's member-owners, then vote against DMEA's request.
- If management asserting that the Kit Carson information is "not relevant" is enough for you, and you don't trust member-owners to decide that for themselves, then vote against DMEA's request.
- If you don't think that Tri-State directors have a fiduciary duty to understand whether in retrospect the Kit Carson exit was fair to all members, then vote against DMEA's request.
- If you have no problem with Tri-State setting exit terms that mean it collects billions more from its members than it has in long-term obligations, then vote against DMEA's request.

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<sup>1</sup> Kyle Martinez, who serves as a director for DMEA and Tri-State, had no role in drafting the Statement of Position.

- If you think that Tri-State management—not the members—owns the cooperative, then vote against DMEA’s request.
- If you don’t think Tri-State has an obligation under the Tri-State Bylaws to let a member withdraw under fair and equitable terms, then vote against DMEA’s request.

The other option is to vote in favor of DMEA’s Policy 316 complaint.

- If you believe transparency, consistency in governance, and fairness to all members should be hallmarks of a cooperative association like Tri-State, then vote for DMEA’s request.
- If you believe that management should not withhold important member exit information from the Board and from member-owners, then vote for DMEA’s request.
- If you believe each cooperative can decide independently for itself and can think independently for itself about the significance of important information, then vote for DMEA’s request.
- If you believe the Tri-State board and member-owners should be able to independently verify if Kit Carson’s exit was “fair and equitable” to all members, then vote for DMEA’s request.
- If you agree with United Power’s June 29, 2018 letter that withholding the requested information puts Tri-State “in the position of bargaining in bad faith,” then vote for DMEA’s request.
- If you believe voluntary membership in Tri-State is a core principle that matters, then vote for DMEA’s request.
- If you believe a contract means something, and that Tri-State management should stand behind the Tri-State bylaws’ promise of voluntary membership, then vote for DMEA’s request.
- If you believe DMEA, like any other Tri-State cooperative, has the right to fair and equitable withdrawal terms, then vote for DMEA’s request.

The Policy 316 dispute mechanism exists to give the Tri-State Board an opportunity to correct Tri-State management’s errors. This is one of those errors. Tri-State’s Board should direct management to share the information to negotiate an equitable exit with DMEA in good faith.

Voting in favor of DMEA’s Policy 316 complaint would further the ideals of transparency and consistency in governance that we believe should be hallmarks of a cooperative association like Tri-State. We hope that you agree.

Please do not hesitate to contact me by email ([jasen.bronec@dmea.com](mailto:jasen.bronec@dmea.com)) or by cell phone (406-229-0233) if you have any questions.

Sincerely,



Jasen Bronec, Chief Executive Officer

/ Enclosures



## **DMEA'S POLICY 316 COMPLAINT POSITION STATEMENT + PROPOSED FINDINGS AND DIRECTIVES**

### **I. BACKGROUND**

#### **1. What is this Position Statement?**

Tri-State directed DMEA to prepare written Position Statements following its Policy 316 complaint presentation at July's Tri-State board meeting.

#### **2. What's in this Position Statement?**

It summarizes key points DMEA made in its July presentation. It also gives the Tri-State Board proposed findings and directives to use in deciding DMEA's Policy 316 complaint.

#### **3. What does DMEA want?**

As detailed in the "Proposed Findings and Directives" section at the end, DMEA asks the Tri-State Board to direct Tri-State management to:

- *First*, disclose the information DMEA has requested about the exit calculations for DMEA and for Kit Carson, and
- *Second*, engage in good-faith negotiations with DMEA on exit terms that are fair and consistent with the 2016 exit terms Kit Carson received.

#### **4. Why did DMEA file this Policy 316 complaint?**

Two reasons: Fairness and transparency. These principles are critical to every Tri-State member and indeed to the existence of a cooperative like Tri-State. This Board has a fiduciary duty to ensure Tri-State management follows these principles.

#### **5. Why is DMEA exiting Tri-State?**

DMEA has spent time and effort assessing how it can best serve its retail member-owners given Tri-State's high wholesale rates. Based on the exit terms Tri-State gave Kit Carson (which had the same 2040 wholesale power contract as DMEA), DMEA believes it can exit Tri-State on fair and equitable terms that will benefit DMEA's members in the long term.

#### **6. Contracts are promises between parties. By exiting, isn't DMEA failing to honor its contractual promise to buy power from Tri-State until 2040?**

Tri-State CEO Mike McInnes said this at July's Tri-State board meeting when he claimed DMEA is trying to "renege" on its promises to Tri-State. Seems persuasive, doesn't it?

But he's wrong. There's a more basic contract between Tri-State and DMEA: the Tri-State bylaws. In those bylaws, Tri-State made a contractual *promise* to DMEA that membership was voluntary and that DMEA could exit on equitable (fair) terms. In refusing to provide



fair terms, Tri-State management is “reneging” on its promise to honor the fundamental contractual obligation between Tri-State and DMEA.

In 2016, management tried (but failed) to amend the Tri-State bylaws to remove a member’s right to exit on fair and equitable terms. That failed attempt, and management’s approach to DMEA’s exit, should trouble every Tri-State member. DMEA has the contractual *right* under the bylaws to request this fair exit, and that’s all it’s doing. Tri-State does not have the right to *deny* a fair exit, but that’s what it’s doing.

## II. SUMMARY OF POSITION

### **REQUEST 1: Tri-State should be transparent in how it calculated DMEA’s exit number.**

#### **7. DMEA says it wants more information about how management calculated DMEA’s very high exit price; hasn’t Tri-State already given DMEA everything?**

No. DMEA has not seen the withdrawal calculation spreadsheet (with the assumptions, data, inputs, and formulas) that DMEA can analyze and understand. Without access to this spreadsheet, DMEA and this Board can only speculate as to how management calculated the variables in DMEA’s exit number.

It’s as if Tri-State has said “ $x + y - z = \text{DMEA’s exit price,}$ ” but won’t show how it calculated  $x$ ,  $y$ , or  $z$ . DMEA simply wants to understand how all the variables were calculated.

#### **8. Is it true that Tri-State can’t share some exit modeling information because Tri-State uses an expensive modeling program called “UI Planner” that DMEA can’t access?**

Member-owners like DMEA pay for UI Planner; why deny them access? In any event, Tri-State should share the DMEA-specific UI Planner inputs, as well as the outputs, and show how they fit into the larger exit calculation spreadsheet/formula.

### **REQUEST 2: Tri-State should be transparent in how it calculated Kit Carson’s exit.**

#### **9. Why is DMEA requesting Kit Carson’s exit information?**

This question is at the heart of DMEA’s Policy 316 complaint: Is Tri-State’s exit number for DMEA fair and equitable as required by Tri-State bylaws? Tri-State gave Kit Carson a \$37 million exit number, but says DMEA must pay [REDACTED]. *Why is DMEA’s exit number [REDACTED] that of Kit Carson’s, particularly when both have the same 2040 contract?*

There are three major factors in Tri-State’s “mark-to-market” exit methodology: the size of an exiting member’s load, future market power prices, and Tri-State’s rates. DMEA is



not [REDACTED] larger than Kit Carson. Market power prices have not changed by [REDACTED]. Tri-State pricing has not changed by [REDACTED].

Tri-State management says the 2016 Kit Carson exit was a fair and equitable buyout, and that it appropriately addressed the risk to the remaining members. Based on the information available to DMEA, it is impossible to reconcile the DMEA and Kit Carson numbers. Tri-State's refusal to give DMEA exit terms consistent with those of Kit Carson suggests that DMEA is not getting an equitable buyout number. By requesting Kit Carson's exit information, DMEA wants to understand the discrepancy.

**10. Is Tri-State management right that the Kit Carson exit number is “not relevant”?**

No. The mark-to-market methodology Tri-State uses *makes* it relevant. Kit Carson provides a benchmark reference for fair and equitable exit terms. The key exit factors that applied to Kit Carson apply to DMEA. *How* Tri-State projected market conditions, loads, rates, etc., and *how* it incorporated these factors into its Kit Carson exit number, are relevant factors that DMEA and all Tri-State members should know.

Is the Kit Carson information exactly on point in every respect? Of course not. Time has passed, load forecasts are different, etc. But it's still a meaningful reference: A 2016 road map is still relevant for a driver in 2018, after all, even if the map is two years old.

**11. How can you compare DMEA and Kit Carson when they entered Tri-State in different circumstances and when Tri-State has invested different amounts in them?**

Wheat Belt Public Power District raised these points in a June 26, 2018 letter. The argument is flawed because none of the factors in that letter have a meaningful effect on the mark-to-market methodology that Tri-State applies when members seek exit. Why should the request for Kit Carson-related information be denied because of differences that aren't relevant to Tri-State's own chosen exit formula?

**12. What if DMEA is wrong, and the Kit Carson exit information isn't relevant?**

Why not be transparent about those differences, and let the member-owners see for themselves? Why hide information that, once revealed, management says would show member-owners why it makes sense to treat one member differently from another? Doing so would further the ideals of transparency and consistency in governance that we believe should be hallmarks of a cooperative association like Tri-State.

**13. Does Board Policy 406 allow Tri-State to disclose Kit Carson's information?**

Yes. Tri-State management incorrectly calls the information "restricted." First, Board Policy 406(C)(1)(f) allows disclosure because Kit Carson gave written consent. Tri-State management shouldn't hide behind confidentiality when Kit Carson has waived it.





Second, information and modeling shared between Kit Carson and Tri-State are not attorney-client privileged under Policy 406(C)(1)(e). Third, Policy 406(1)(C)(1)(g) only applies to information as to which Tri-State has a legal obligation to refuse disclosure, such as information belonging to a third party subject to a confidentiality agreement; management should justify concealing the information when Kit Carson has consented.

**14. Would disclosing Kit Carson’s information disadvantage other Tri-State members?**

No. In fact the opposite: When Kit Carson exited, Tri-State said in a press release that the exit was “fair and equitable, and protects the interest of all the association’s members.” If the Kit Carson exit was equitable to Tri-State and all its members, how are any other members disadvantaged if Tri-State treats another exiting member on the same terms?

**15. How can Tri-State Board members and owners know whether the Kit Carson exit terms were fair and equitable unless there’s transparency? Should the Board accept management’s apparent position that secret modeling can explain the difference?**

Good questions. Tri-State’s 2017 *Form 10-K* filed with the Securities and Exchange Commission disclosed that if Tri-State underestimates “the monetary value of a Member’s obligation . . . our ability to satisfy our financial obligations could be adversely affected.” If the Board-approved method is accurate, why issue a disclaimer? And if Kit Carson’s exit was equitable to Tri-State and all of its members, as management claims, then all members should be able to evaluate that for themselves. Why disclose that risk in an SEC filing but then conceal information from Tri-State’s Board and from its member-owners that would let them make that determination?

**REQUEST 3: Tri-State management should negotiate an equitable withdrawal for DMEA.**

**16. What does it mean when DMEA says it’s requesting an equitable buyout number consistent with Kit Carson’s exit?**

DMEA asks this Board to direct Tri-State management to negotiate DMEA’s exit on fair and equitable terms, as required by the Tri-State bylaws, and consistent with Kit Carson.

In the eighteen months since DMEA first requested an exit calculation, management has not negotiated in good faith and has refused to be fair and transparent with a member-owner. It gave DMEA an exit number [REDACTED] more than the exit number Kit Carson received for the same 2040 contract. DMEA is not [REDACTED] than Kit Carson, and none of the other mark-to-market inputs changed by [REDACTED]. Management claims it has modeling information for DMEA and Kit Carson that support this discrepancy, but won’t provide it. This lack of transparency suggests an approach to DMEA—and by extension all of you—as outside third parties rather than as members and owners.



**17. DMEA keeps saying the Tri-State bylaws require “fair and equitable” exit terms, but doesn’t Article I, Section 3 of the bylaws just say “equitable”?**

“Equitable” means fair. And DMEA isn’t the first to describe the bylaws as requiring “fair and equitable” exit terms: Tri-State itself said during the Kit Carson exit that the bylaws provide for a “*fair and equitable*” exit. (Tri-State June 27, 2016 press release.)

**18. But what about Tri-State management’s claim that DMEA’s high exit number is justified by the risk to other members from DMEA’s withdrawal?**

This argument doesn’t fit with Kit Carson’s exit, and suggests that Tri-State management is not following the required mark-to-market exit methodology for either Kit Carson or DMEA. If Kit Carson’s \$37 million exit number was equitable and covered other members’ risk, as management claims (while withholding the relevant information it says supports that), then DMEA’s [REDACTED] number is inequitable. If DMEA’s [REDACTED] exit number is necessary to cover the risk to Tri-State’s remaining members, Kit Carson’s exit unfairly left the remaining members with millions of dollars in risk. Either way, management’s actions—including what they represented to the Board during Kit Carson’s exit, and what they’re representing now—are deeply troubling.

**19. What about Mike McInnes’s comment that DMEA could just withdraw from membership and continue to buy power from Tri-State under the 2040 contract?**

This would have DMEA give up the benefits of membership for nothing in exchange. That’s not “fair and equitable.” Nor is it what Tri-State did with Kit Carson.

**REQUEST 4: Consider the broader issues raised by DMEA’s request.**

**20. Is your Tri-State membership really voluntary?**

Tri-State says voluntary membership is a “core principle” of the company. In 2016, however, management tried to amend the bylaws and take away the promise made to all members of a fair and equitable voluntary withdrawal. That failed. Management’s alternative approach—setting an exorbitant exit price and refusing to provide justification—seems intended to have the same effect.

**21. Who owns Tri-State: the members, or Tri-State management?**

Article VI of Tri-State’s Articles of Incorporation say that Tri-State shall be operated on a cooperative, non-profit basis for the mutual *benefit of its members*.” Tri-State’s 2018 *Investor Presentation* states that it “follow[s] the cooperative business model,” and says the association “is member-owned and member governed.” Are those documents consistent with Tri-State’s actions here? Who benefits when members are kept in the dark about the specific terms of a member’s exit? Who benefits when management keeps secrets from the Tri-State Board and the member-owners? How is management treating



the Board and member systems like outside third parties consistent with the principles of member ownership and member governance?

**22. Should your distribution cooperative know its buyout number?**

The cost of power is your cooperative's largest expense. Everyone on the Tri-State Board of Directors is also director of a local distribution cooperative. Understanding what happened with Kit Carson helps you meet your fiduciary responsibility to your local cooperative. You should know how your cost of purchasing power through Tri-State compares to alternative suppliers. If you don't know how the Kit Carson number was determined and what your coop's exit number would be, how can you fulfill your responsibility to the members of your local cooperative to ensure that Tri-State is delivering an appropriately cost-effective power supply?

**23. As a Tri-State director, shouldn't you know the details about Kit Carson's exit?**

If you are concerned about the sustainability of Tri-State and your fiduciary duties to Tri-State, it is in your interest as a Tri-State director to know the likelihood that other coops will exit Tri-State, and the related financial impact to the G&T.

**24. What does DMEA's [REDACTED] exit number mean for other Tri-State members?**

It should be troubling. If you take the [REDACTED] exit number that Tri-State has given to DMEA and proportion it out to all cooperatives, it would total more than [REDACTED]. This is more than [REDACTED] the amount of Tri-State's long-term debt. Why does Tri-State need DMEA—or any member—to pay a number that would result in that kind of windfall for Tri-State? By contrast, it appears Kit Carson's exit price was roughly equal to its proportionate share of long-term debt.

**25. Have other cooperatives expressed support for DMEA's Policy 316 complaint?**

Yes. United Power, San Isabel, and La Plata have sent letters supporting DMEA. They are enclosed with this Statement of Position.



### **III. PROPOSED FINDINGS AND DIRECTIVES**

DMEA requests that the Tri-State Board adopt the following findings and directives in response to DMEA's Policy 316 complaint:

#### **Findings**

- A. The information requested by DMEA in its Formal Board Policy 316 Complaint is relevant to DMEA's request to withdraw from Tri-State.
- B. There is no basis under Board Policy 406 for refusing to disclose this relevant information to DMEA.
- C. Based on the available information, the Board is unable to reconcile Kit Carson's \$37 million exit number and the [REDACTED] exit number proposed to DMEA.

#### **Directives**

- D. The Tri-State Board directs management to disclose the following information:
  - 1) All information requested in DMEA's May 17, 2017 Policy 406 information request to Tri-State regarding information and a detailed spreadsheet/model used to calculate DMEA's exit number;
  - 2) The information requested in DMEA's April 24, 2018 Policy 406 information request regarding Kit Carson, including the model and inputs used to calculate Kit Carson's exit number; and
  - 3) Such other information that will allow DMEA to make a side-by-side comparison of the assumptions, inputs, and modeling underlying the Kit Carson and DMEA exit numbers.
- E. The Board directs management to negotiate equitable exit terms with DMEA that are consistent with (and can be reconciled with) Kit Carson's exit.



June 29, 2018

Mr. Rick Gordon  
Tri-State Generation and Transmission  
1100 West 116<sup>th</sup> Avenue  
Westminster, CO 80233

Re: Delta Montrose Electric Association, Inc. (“DMEA”) Formal Complaint

Dear Mr. Gordon:

The leadership of United Power appreciates the opportunity to comment on the above referenced complaint by DMEA.

United Power does not wish to be a party to the proceedings surrounding the DMEA complaint, but offers the following comments in the interest of fairness between the members of Tri-State Generation and Transmission Association, and transparency and consistency in the governance of the Association.

United Power (“UP”), then known as Union Rural Electric Association, is one of the founding members of Tri-State Generation and Transmission Association (“TS”). As a founding member, and a proud cooperative ourselves, we are highly interested in maintaining the foundational principals of the cooperative relationship; in particular, the equitable treatment of ALL members. We believe that this is not only a requirement of the TS bylaws, but also a standard of the cooperative form of governance in general. The history of cooperatives is rife with case law where the courts have enforced members’ rights to be treated equally and fairly.

UP strongly believes that DMEA should be permitted access to the information they have requested regarding the calculation of their buy-out number from TS. Without that information, how can DMEA (or any other member or entity, such as the TS Board) determine that the amount quoted is equitable? DMEA is much more than a customer of TS; they are an owner of the Association and, as such, should be entitled to a higher level of access to information necessary to conduct business and make sound decisions. The continued withholding of that information puts TS in the position of bargaining in bad faith.

Tri-State Generation and Transmission  
June 29, 2018

The TS bylaws, Article I, Section 3.a., allow for the withdrawal of a member “upon compliance with such equitable terms and conditions” as prescribed by the TS Board. Inherently, the clause requires that the withdrawal terms be equitable not only to the withdrawing member, but to the remaining members as well. The complete lack of transparency by TS surrounding not only the DMEA withdrawal, but also the Kit Carson withdrawal makes it impossible to determine the level of equity among the members for these two transactions.

The Objective paragraph of Policy 316 states that the intent of the policy is to provide a full opportunity for a member to present its case on any issue to the TS Board. Step 2 (paragraph eight) of that policy provides for a process that promotes “the full exchange of ideas and opinions...”. UP has serious doubts that the 40 minutes allowed for DMEA (as outlined in the June 15, 2018 letter from Mr. Gordon) to present its case to the TS Board will be an adequate amount of time to meet the “full exchange” standard established in the policy. It is our understanding that the DMEA complaint is the first instance of the use of Policy 316, or at least the first instance that has gone as far as formal consideration by the TS board. The process adopted will set precedent for the future application of the policy and, therefore, UP is interested in ensuring that the process is one that allows for a true and adequate exchange of ideas and opinions among the membership.

The complaint by DMEA raises issues that are very specific to its situation, but are also very important to the entire membership. There are positions being taken by TS that seem to conflict with the cooperative principle of voluntary and OPEN membership (emphasis added). Does TS view itself as a corporate entity, completely separate and distinct from its members? According to Tri-State’s Cooperative Business Model page of their website, Tri-State is an Association made up of members and with no purpose other than to supply the power needs of those members and their consumers. Tri-State professes to “work tirelessly to engage our members and ensure we meet their wholesale power needs and provide the services THEY VALUE.” The fact that DMEA cannot get the information it seeks on its buyout numbers indicates that TS does not really subscribe to the idea of OPEN membership.

Tri-State’s Policy 406 section D states that “If a request submitted by a Member System involves or pertains to Restricted Information of or pertaining to one or more other Member Systems, such information shall not be disclosed except upon Tri-State’s receipt for written authorization from all Member Systems involved.” Mike McInnes’ letter of May 8, 2018 appears to be in direct violation of this policy because Kit Carson has consented to the disclosure of their buy-out calculation to DMEA. Based on that consent, UP believes that DMEA is entitled to receive the confidential information provided during the course of negotiations with Kit Carson’s withdrawal from TS membership upon execution of a valid non-disclosure agreement.

We respectfully request the TS Board positively consider the request for information by DMEA.

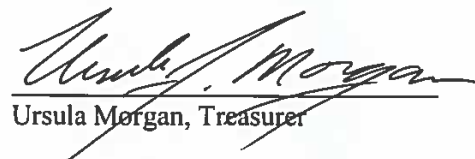


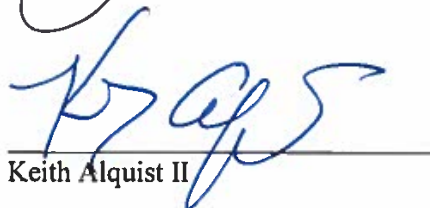
Tri-State Generation & Transmission  
June 29, 2018

  
James Vigesa, President

  
Susan Petrocco, Vice-President

  
Elizabeth Martin, Secretary

  
Ursula Morgan, Treasurer

  
Keith Alquist II

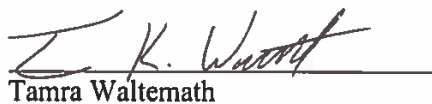
  
Ginny Buczek

  
Tim Erickson

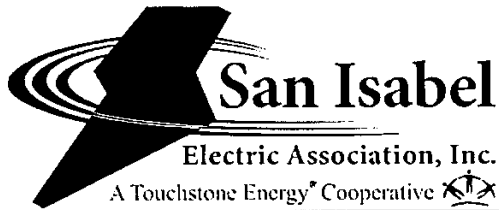
  
Brian McCormick

  
Rick Newman

  
Dave Rose

  
Tamra Waltemath

  
John Parker, Chief Executive Officer



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San Isabel Electric Association, Inc. is an equal opportunity provider and employer.

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July 6, 2018

Mr. Rick Gordon  
Tri-State Generation and Transmission  
11 West 116<sup>th</sup> Avenue  
Westminster, CO 80233

Re: Delta Montrose Electric Association, Inc. (DMEA) Formal Complaint

Dear Mr. Gordon:

The Board of Directors of San Isabel Electric Association supports DMEA's request for information regarding the Kit Carson buyout. We believe every member of Tri-State should have transparency into the transactions that could have an impact on our equity/ownership position. Every member of Tri-State should have a clear understanding of the methodology that would be used if they no longer desired to be a member-owner of Tri-State.

The electric utility industry is becoming more competitive. As distributed energy resources drop in price, our consumers are being courted by vendors that have identified opportunities to exploit our cooperative business model. The two weaknesses we must address are: the high costs of serving rural areas and purchased power costs. At San Isabel Electric we've held controllable costs flat for the past ten years. This required a drastic shift in strategy that included a reduction of our workforce by more than twenty five percent.

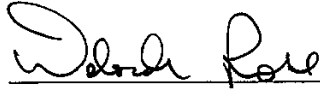
What is Tri-State's strategy for the future? As a member-owner of Tri-State, San Isabel Electric doesn't know because strategic planning is conducted in executive session. This lack of transparency does nothing to create a feeling of ownership, on the contrary we feel like we are no more than a customer.

The member-owners cannot make good business decisions when we don't have information. Being bound to a long-term power supply used to be an asset, but today is a liability. Recent rate stability from Tri-State has been a welcomed reprieve but is not enough. What dramatic steps will be taken to become a more competitive power supplier for the member-owners?

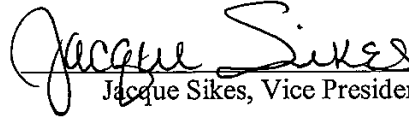
The member-owners of Tri-State have the right to know what Tri-State's detailed strategy is, and we have the right to know what the formula for getting out of Tri-State will be, so business decisions can be made. Maybe every member of Tri-State doesn't feel the competitive pressures, but every member of Tri-State should be working to bring as much value to the end-use consumers as possible.

**S**ervice **I**ntegrity **E**xcellence **A**ccountability  
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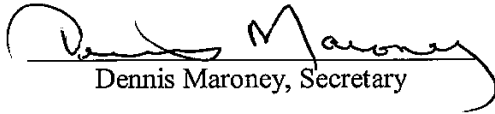
We strongly urge the Tri-State Board of Directors to honor the request of DMEA. If Kit Carson wasn't given a "sweet heart" deal, then let the rest of the membership know that. Additionally, if Tri-State feels they are offering a competitive solution for the member-owners then become more transparent with the buy-out methodology and the strategic plan. San Isabel Electric's Board of Directors see a growing division between Tri-State and many member-owners, including us! That's not a sustainable cooperative model.



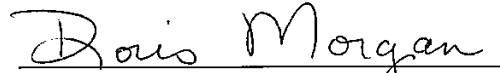
Deborah Rose, President



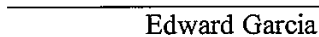
Jacque Sikes, Vice President



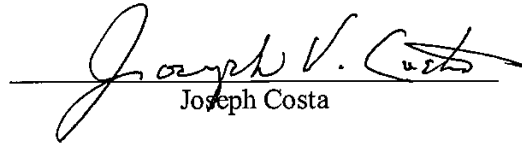
Dennis Maroney, Secretary



Doris Morgan, Treasurer



Edward Garcia



Joseph Costa

cc: Tri-State Member Managers



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June 29, 2018

Michael McInnes, Chief Executive Officer  
Tri-State Generation & Transmission Association, Inc.  
1100 West 116<sup>th</sup> Ave.  
Westminster, CO 80234

Jasen Bronec, Chief Executive Officer  
Delta-Montrose Electric Association  
Po Box 910  
Montrose, CO 81401

Re: LPEA Handout for DMEA TS BOD Policy 316 Complaint hearing

Dear Mike and Jasen:

LPEA submits this letter which contains the comments I will make at the DMEA Policy 316 Complaint hearing:

1. Tri-State Articles, (Article VI, Organizational Structure, states in part “This Corporation is formed without any purpose of direct gain or profit to itself, and it shall be operated on a cooperative, non-profit basis for the mutual benefit of its members”), and Tri-State bylaws, (Article I, Membership, Section 3 Withdrawal..., subsection (a) starts in part “A member may withdraw from membership upon compliance with such equitable terms and conditions as the Board of Directors may prescribe provided, however, that no member shall be permitted to withdraw until it has met all its contractual obligations to this Corporation”) are both contractual obligations between Tri-State and its member cooperatives to provide services and charge for those services in mutually beneficial ways to the members, and in the case of withdrawal of members, to ensure equitable treatment of all its members. Those duties and obligations cannot be fulfilled without transparency of the details of the exit of one of Tri-State’s members, Kit Carson, and the process by which Tri-State is calculating the proposed exit of another member, DMEA. Equitable is not a term reserved for one party to a contract. Determining equitable treatment is where the facts are known sufficiently for all parties to so declare the terms as equitable.
2. Tri-State’s degree of success is wholly contingent upon the cooperation and commitment of its distribution member cooperatives with one another and Tri-State. We would agree a key tenant of that process is disclosure of information. Tri-State should disclose its methods for calculating Kit Carson’s and DMEA’s buyout numbers.

LPEA is an equal opportunity provider and employer M/F/Disability/Veteran.

If you wish to file a Civil Rights program complaint of discrimination, complete the USDA Discrimination Complaint Form, found online at [http://www.ascr.usda.gov/complaint\\_filing\\_cust.html](http://www.ascr.usda.gov/complaint_filing_cust.html), or at any USDA office, or call (866) 632-9992 to request the form. You may also write a letter containing all of the information requested in the form. Send your completed complaint form or letter to us by mail at U.S. Department of Agriculture, Director, Office of Adjudication, 1400 Independence Avenue, S.W., Washington, D.C. 20250-9410, by fax (202) 690-7442 or email at [program.intake@usda.gov](mailto:program.intake@usda.gov).

Comments respectfully submitted.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael A. Dreyspring", is written over the word "Sincerely,".

Michael A. Dreyspring  
CEO